United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

ORIGINAL

76-2173

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In The

United States Court of Appeals

For The Second Circuit

ARTHUR DRAYTON,

Petitioner-Appellee,

-against-

THE PEOPLE OF THE STATE OF NEW YORK, EUGENE GOLD, DISTRICT ATTORNEY, AND LOUIS J. LEFKOWITZ, ATTORNEY GENERAL STATE OF NEW YORK, DEPARTMENT OF CORRECTIONS OF THE CITY OF NEW YORK AND BENJAMIN MALCOLM, COMMISSIONER, ARTHUR RUBIN, WARDEN OF RIKERS ISLAND,

Respondents-Appellants.

PETITION FOR REHEARING WITH A SUGGESTION FOR EN BANC

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DOCKET NO. 76-2173 No. 927- SEPTEMBER TERM, 1976

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PETITION FOR REHEARING

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT:

ARTHUR DRAYTON, the petitioner-appellee, above named, presents this, his petition for a rehearing in the above entitled cause, and, in support thereof, respectfully shows:

1. The appeal is by the State of New York from the granting of habeas corpus in the United States District

Court, on the ground that New York CPL 720.20 (1) is unconstitutional in that it renders youthful offender treatment mandatory for some 16 to 18 year olds convicted of misdemeanors and sentenced in the New York City Criminal Court, but discretionary for the very same conviction of the very same misdemeanors for 16 to 18 year olds, in the very same circumstances, sentenced in the New York State Supreme Court. This Court has reversed the judgment of the District Court, and has held constitutional a statutory scheme which permits the New York State Supreme Court to impose an adult sentence upon a minor qualified for youthful offender treatment, while another minor, sentenced in the New York City Criminal Court, for the same crime, and having the very same background, and being in the very same circumstances, would be entitled to youthful offender treatment as a matter of right. This Court has thus held constitutional a statutory scheme which, for the very same crime, and under the very same circumstances, provides for a higher maximum sentence in the New York State Supreme Court, and a lower maximum sentence in the New York City Criminal Court. If twin minors, with identical backgrounds and records, each committed the

identical misdemeanor, and each similarly qualified for youthful offender treatment, were separately sentenced, one in the New York State Supreme Court, and the other in the New York City Criminal Court, the former would be subject to a more severe maximum penalty than the latter. Petitioner-appellee submits that this is a clear case of unequal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, a violation that cannot be justified by any rational classification.

2. The court in its opinion of reversal herein, at page 3, stated that it is the position of the petitioner that "he has received the more severe penalty solely because he was originally charged with a felony." This is a clear misstatement of the thrust of the original petition and of the position that the petitioner has taken throughout the proceedings that have been aired in the state courts and in the federal courts. Petitioner's position is that not only has he been charged with a more severe penalty because he was originally charged with a felony, but that the original charge of the felony was completely unwarranted. Throughout all the proceedings, petitioner maintained, again and again, before every court in which the matter was heard, that when the petitioner offered to plead guilty to a misdemeanour, the prosecutor

recommended acceptance stating, for the record, that it had been determined, by the prosecution, that, based upon statements of the two complaining witnesses, the charges, in the indictment, were unjustified and that the petitioner should have been charged with nothing more than a misdemeanour. In this connection, this court completely overlooked petitioner's argument, at pages 8, et seq., of petitioner's brief submitted to this court, on the original appeal. At that point, petitioner submitted to this court that "obviously, petitioner, due to sheer error in procedure of the prosecution, has been prosecuted in other than a local criminal court where he should have been prosecuted, and has been deprived without due process of his right to youthful offender treatment. He has been denied equal protection of the law." The petitioner also stated, at page 11 of his brief in this court, on the original appeal, that the law with respect to penalties to be imposed for a crime must operate equally on every defendant appearing before any of the courts of any particular state; and the statute, at bar, is void as a denial of equal protection because it permitted different

punishments to be administered to persons in the very same situation merely because they appeared in different courts. This court has apparently overlooked this argument completely.

3. This court, has based its reversal, to a substantial extent, upon its determination that the sentence which the petitioner received was the result of a plea bargain. The record circumstances of the guilty plea established, beyond cavil, that there was no plea bargain in this case at all. It cannot be disputed that the prosecutor stated, for the record, that based upon statements of the complaining witnesses, the indictment for a felony had absolutely no basis. The plea, to a misdemeanour, was therefore obviously accepted because the prosecution could not prove a felony and the acceptance of the plea for a misdemeanour was for the prosecution's benefit rather than for the benefit of the petitioner.

4. Further, at page 5 of its opinion of reversal, this court concluded that the petitioner "presses his claim as if he had been denied youthful offender status solely because of the original felony accusation." This statement

has absolutely no basis in the record. Throughout all of the proceedings, petitioner pressed his claim because he had been denied the right to youthful offender status, regardless of whatever he had been charged with. Petitioner's position has always been, and still is, that the original felony accusation was unjustified and unwarranted. However, primarily, his position is that he has been the victim of unequal protection of the law insofar as the sentence is concerned, regardless of whatever he had been originally charged with. Thus even if there had been some other accusation, petitioner's position would be the same, and the accusation, in the indictment, as well as the information in the probation report, are thus of little materiality.

5. At page 6 its opinion for reversal, this court relied upon three decisions of this court, United States v. Cifarelli, 401 F 2d 512, cert. denied 393 U.S. 987; United States v. Doyle, 348 F 2d 715, cert. denied, 382 U. S. 843; and United States v. Sweig, 454 F 2d 181. This court held held that these cases established that a sentencing judge may rely, in imposing sentence, upon facts relating to charges that had not resulted in conviction. The rationale

of these cases is that a sentencing judge must consider all facts that may have some relation to the conduct of the defendant to be sentenced, and then may impose a sentence partially based upon those facts as long as the sentence is within the statutory limits provided these cases do not establish that a sentencing court may rely on misinformation or on false evidence. McGee v. United States 462 F2d 243 (Second Circuit); United States v. Tucker, 404 U.S. 443. The sentencing court at bar, and the grand jury, relied upon misinformation and false evidence in the prosecution of the petitioner and the eventual sentence.

6. At page 6 of its opinion, this court approved the holding of the New York Court of Appeals that "there is no invidious discrimination involved in a Legislative decision that those individuals who, on preliminary investigation, are believed to have committed felonies should not automatically be endowed with the benefit of youthful offender status..." In endorsing this opinion of the New York Court of Appeals, this court fell into the very same error committed in Albany. In so doing this court completely

overlooked the authorities cited at page 17 of the petitioner's brief submitted to this court upon the original appeal, wherein petitioner quoted from a United States Supreme Court decision as follows: "When the law lays an unequal hand on those who have committed the same quality of offense, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. Yick Wo v. Hopkins (118 U.S. 356,...; Gaines v. Canada, 305 U. S. 337." Skinner v. Oklahoma, 316 U.S. 535,541.

7. At page 7 of its opinion for reversal, this court discusses "the option of considering adverse information ....., whenever by the return of an indictment, it is established that there exist facts constituting at least probable cause to believe the defendant has committed a felony." It has already been demonstrated, supra, that the prosecution conceded that, at bar, there were no such facts to constitute probable cause to believe that the petitioner had committed any felony.

8. In its opinion, this Court quoted, with approval,

from the concurring opinion of Mr. Justice Shapiro in the Appellate Division to the effect that the petitioner had made a bargain and should be held to it. It has already been demonstrated, in paragraph 3, supra, that no bargain was at all involved. In addition, the New York State Court of Appeals had recently held that a guilty plea is no waiver of a defendant's right to claim the unconstitutionality of a statute. People v. Barry A., 40 N. Y. 2d 990.

9. In its opinion, this Court approved the distinction, drawn by Mr. Justice Shapiro of the Appellate Division, "between challenges to Section 720.10 and to Section 720.20". At bar, that distinction was improper. The Barry A. case, supra, is clear authority for the determination that there is "no rational basis for unequal treatment of youths who have been convicted of the same offense merely because one of them had originally been charged with a higher crime." This quotation is from Mr. Justice Rabin's dissenting opinion at the Appellate Division in Barry A. The Court of Appeals reversed the Appellate Division on that dissenting opinion, thus determining that petitioner should not be deprived of his right to equal

protection merely because of an unfounded, improper, unprovable, felony indictment.

For all of the reasons set forth above, and in petitioner's papers previously submitted and on file with this court, it is respectfully submitted that this petition should be granted and that the decision of this court reversing the Judgment of the District Court, should be reviewed by this court sitting in banc.

Respectfully submitted

Attorney for Petitioner
Office & P. O. Address

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COURT OF APPEALS
SECOND CIRCUIT

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- against -

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Respondents-Appellants.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,

That on the 6th *day of* June, *19*77 *at* Municipal Building Brooklyn, N.Y.

deponent served the annexed Petition for Rehearing-En Banc *upon* Eugene Gold Dist. Atty-King County

the *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 6th *day of* June, *19* 77

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1979

Kevin E. Thomas
Print name beneath signature
KEVIN E. THOMAS